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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1052

S. EDWARD BLOOM,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported as *The People of the State of Illinois* v. *Bloom,* 35 Ill. 2d 255, 220 N. E. 2d 475, decided on September 23, 1966, and reprinted at Appendix 1a of the Petition.

JURISDICTION.

The jurisdiction of this Court is invoked by petitioner pursuant to 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Is the imposition by a state court of a two year sentence for criminal contempt of court without a trial by jury violative of the Sixth and Fourteenth Amendments to the Constitution of the United States?
2. Are the Fifth and Fourteenth Amendments to the Constitution of the United States violated by: (a) The appointment of an *Amicus Curiae* by the State trial judge, prior to the formal institution of contempt proceedings, to investigate and report facts surrounding an alleged contemnor's conduct without making such report part of the record of the contempt proceedings; (b) comment in a state criminal contempt proceeding of the failure of the alleged contemnor to testify in his own behalf.

STATEMENT.

The statement of the petitioner (Petition, pp. 5-7) fails to set forth, in a cogent or chronological manner, the fact pattern and procedure which ultimately resulted in the imposition of a twenty-four month sentence for contempt of court upon the petitioner, S. Edward Bloom. The complete facts, as evidenced by the voluminous transcript of proceedings filed in this Court, are as follows:

William A. Melody, a resident of Cook County, Illinois, died testate on the 6th day of July, 1964 (Abst. 2). His last Will and Testament, executed on October 4, 1962, and amended by codicil on August 9, 1963, was filed in the office of the clerk of the Circuit Court of Cook County, Probate Division, on July 7, 1964 (Abst. 87). These documents were prepared and executed by the law firm of Lelivelt, Swidler and Juron, and filed by the executor named in the instruments, the Northern Trust Company, together with a petition requesting that the last Will and Testament of

William A. Melody be admitted to probate (Abst. 4). The petition contained, among other statements, the last address of decedent, the approximate value of the estate and a list of all heirs and legatees of the decedent (Pet. Exhibit H; Rec. 1521).

On July 17, 1964, an instrument, purported to be the last Will and Testament of William A. Melody, and dated June 21, 1964, was presented at the offices of the named executor by Pauline Owens, a practical nurse who had attended the decedent for several years prior to his death (Record, p. 964; Addl. Abst. 12). On July 20, 1964, because of the discovery of this instrument two weeks subsequent to the decedent's death, a meeting was held at the Northern Trust Company attended by officers of the bank, Mr. Swidler, and the petitioner, S. Edward Bloom. At this meeting, the bank officers stated that it was their policy to retain the attorney who drew the Will and that if Mr. Bloom was going ahead with the filing and proof of the Will, it would be his job (Record, p. 970; Addl. Abst. 12). Petitioner then invited Swidler, who had represented testator during his lifetime and had prepared the instruments of October 4, 1962, and August 9, 1963, to assist him in the probating of the Will dated June 21, 1964 (Record, p. 970; Addl. Abst. 12). Swidler thereupon questioned petitioner as to his meeting with deceased, the circumstances surrounding his compilation of information and the contents of the Will. Petitioner informed Swidler that on June 12, 1964, he was called by Pauline Owens and that he went to the Melody apartment on that date to procure the necessary information. He also stated to Swidler that he met the decedent, carried on a conversation with him, that Mr. Melody spoke in a hoarse voice, mumbled, and that Mrs. Owens aided defendant by explaining what the deceased was trying to say. Petitioner further stated to Swidler that he prepared the Will, called for an appointment at

the Melody apartment, was told to mail the document instead, and did so (Record, pp. 972-973; Addl. Abst. 12, 13). Petitioner, upon request, presented a copy of the Will, which Will was signed by witnesses and dated June 21, 1964 (Record, p. 973; Addl. Abst. 13). The Will dated June 21, 1964 was, on July 20, 1964, filed in the office of the Clerk of the Circuit Court, Probate Division, by the petitioner (Abst. 18).

On August 5, 1964, a second meeting, called at the insistence of Edward Arkema, an attorney representing certain heirs of the Melody estate, was arranged at the office of the Northern Trust Company. Those present were Mr. Kaufman and Mr. McNeil, bank officers, Mr. Arkema, Mr. Swidler and petitioner, Bloom (Record, p. 1008; Addl. Abst. 15). Arkema inquired whether petitioner prepared or dictated the Will of June 21, 1964, how petitioner received his information, when he received the information and from whom he received it. Petitioner stated that he prepared the Will and that he received the information from talking with Mr. Melody (Record, p. 1009; Addl. Abst. 15). Arkema then confronted petitioner with a medical report by the physician of Mr. Melody which stated that on June 16, 1964, the decedent, in his opinion, could not communicate (Record, p. 1010; Addl. Abst. 15). Arkema then addressed petitioner casting doubt as to the validity of the Will of June 21, 1964, and suggested that it would be best for petitioner to sign an affidavit attached to the Will that such is a true copy of the Last Will and Testament of William A. Melody. He further requested that, if petitioner were to petition for the admission of the Will to probate, a similar affidavit should be attached (Record, p. 1011; Addl. Abst. 13). Petitioner refused to do so unless he obtained written authority from the bank, whereupon the bank officials refused to issue such letter (Record, p. 1012; Addl. Abst. 15).

On August 11, 1964, at 2:00 P. M., Judge Gumbel had set for hearing the petition of the Northern Trust Company asking the Court to admit to probate the instruments dated October 4, 1962 and August 9, 1963 (Record, p. 1521, Exhibit No. 3). Present were Louis Swidler and Marvin Juron, in their capacity as attorneys for the executor, and Edward Arkema, attorney for certain heirs of the decedent, William A. Melody. Whereupon, the petitioner, S. Edward Bloom, formally presented a petition before Judge Gumbel requesting that the instrument dated June 21, 1964, and purporting to be the Last Will and Testament of William A. Melody, be admitted to probate (Record, p. 1017; Addl. Abst. 16). The petition filed by petitioner and signed by an officer of the Northern Trust Company contained, among other matters, the following statement:

> "William A. Melody, whose place of residence at the time of his death was 2052 Lincoln Park West, Chicago, Cook County, Illinois, died July 6, 1964, leaving a Will dated June 21, 1964." (Abst. 2.)

At this juncture, it becomes necessary to return to those series of events surrounding the preparation of the Will which petitioner presented to the court on August 11, 1964. The circumstances with respect to the period prior to, during and immediately after the preparation of the Will dated June 21, 1964 can best be summarized as follows:

On July 8, 1964, two days after the death of William A. Melody, Pauline Owens, the practical nurse attending Mr. Melody, called at the office of attorney Bernard Koenig, who had previously represented Mrs. Owens in legal matters (Record, p. 1056; Addl. Abst. 16). Mrs. Owens told Koenig that Mr. Melody had died on July 6, 1964; that on the date of his death a firm of lawyers had prepared a petition to probate his Will, but that this Will did not reflect the true intentions of the deceased; that she wanted another Will prepared (Record, p. 1058; Addl. Abst. 17).

Mrs. Owens also told Koenig that she had a list of the persons who were to receive bequests. Such list was written on typewriter size paper which, according to Koenig, appeared to be in Mrs. Owens' handwriting (Record, p. 1060; Addl. Abst. 17). Koenig refused to draw up a Will but agreed to check the court file to determine if an estate had been opened (Record, p. 1061; Addl. Abst. 17).

On July 9, 1964, Mrs. Owens and Koenig again met. Koenig told her that an estate had been opened, that a Will had been filed, and that he wanted nothing further to do with the situation. Mrs. Owens' efforts to persuade Koenig to prepare a Will for the deceased continued to no avail (Record, p. 1063; Addl. Abst. 17).

On July 11, 1964, Mrs. Owens again called Koenig asking him to reconsider his denial to prepare a Will for William A. Melody. Koenig told her, and his testimony relates that he did so in order to discourage her from calling, to bring the sum of $1,500.00 to his office. Mrs. Owens telephoned Koenig on Sunday, July 12, 1964, stating that she had the amount he requested and would meet him at his office on Monday, July 13, 1964. Mrs. Owens appeared at Koenig's office on July 13, 1964, showed him the $1,500.00 in her purse and requested that a Will be drawn. Koenig refused and told Mrs. Owens to "get someone else." Mrs. Owens then left, without Koenig either accepting the money or drawing the spurious document which she requested (Record, pp. 1067-1070; Addl. Abst. 18).

On July 14, 1964, Sandra Kernene, a secretary-stenographer employed on a part time basis by petitioner, S. Edward Bloom, arrived at work at approximately 12:30 P. M. As she entered petitioner's private office pursuant to his request, she observed petitioner, a client, Pauline Owens, and another secretary, Susan Cohen (Record, p. 911; Addl. Abst. 7). Petitioner stated that he needed Mrs. Kernene immediately; that he was going to dictate a Will. The

petitioner told her that the name of the testator was William A. Melody (Record, pp. 911, 922; Addl. Abst. 8). Mrs. Kernene took the dictation in shorthand; while dictating, petitioner referred to some papers or notes (Record, p. 912; Addl. Abst. 8). Mrs. Kernene then typed the Will, stapled it together and gave it to petitioner. After some moments, petitioner told Mrs. Kernene that some changes were to be made, involving amounts of legacies. One change increased the bequest to Mrs. Owens from $20,000.00 to $40,000.00 (Record, p. 939; Addl. Abst. 9-10). Mrs. Kernene revised the Will and finished about 5:30 P. M. on July 14, 1964. It was read by petitioner, stapled together and handed to Mrs. Owens, who then left the office (Record, pp. 944-947; Addl. Abst. 10).

Mrs. Kernene was positive that the day she typed the Will was July 14, 1964, for on that date, her husband dropped off a check for $122.00 at her office, which check she deposited in her account (Record, p. 958; Addl. Abst. 11). Mrs. Kernene had not been at petitioner's office since July 2, 1964; July 14, 1964 was the last date that she worked for petitioner (Record, p. 951; Addl. Abst. 10).

The Will typed by Sandra Kernene on the afternoon of July 14, 1964 was the same Will presented for probate by the petitioner in open court on August 11, 1964 (Record, p. 957; Addl. Abst. 16). (See People's Exhibit 1.) Mrs. Kernene so identified the document (Record, p. 909; Addl. Abst. 11).

One of the signators to the document dated June 21, 1964, Velma Hoyle, testified that she and Betty Jean Tewell, the other witness, affixed their signature to the document between July 6 and July 18, 1964 at Miss Hoyle's home in Waukegan, Illinois; that it was not signed in the presence of Mr. Melody; that she affixed the date of the Will as June 21, 1964 at the direction of Alma Allen and Pauline

Owens; and that the Will was left and picked up by Alma Allen after she and Betty Jean Tewell signed it (Record, pp. 805-814). Previous to the testimony given by Velma Hoyle at the contempt hearing of defendant, both Hoyle and Tewell, on September 17, 1964, confessed to the court that they affixed their signatures to the Will after the death of William A. Melody (Abst. 42-43).

Having depicted, in proper perspective, the episode of July 6-17, 1964, involving the circumstances leading to the origination of the Will dated June 21, 1964, we now recount the events subsequent to August 11, 1964.

On August 18, 1964, petitioner Bloom presided over a meeting which he called at the Sherman House in Chicago, for the purpose of apprising the heirs and legatees of the Will dated June 21, 1964. At that time, petitioner urged those present to retain their own attorneys to represent them in connection with their interests under the Will. He further stated that since there might be action taken to contest the Will, they would be at liberty to retain counsel (Record, p. 988; Addl. Abst. 13).

On August 25, 1964, a petition was filed by Edward Walliser, an heir of the decedent, requesting the appointment of an *Amicus Curiae* to investigate fraud with respect to the estate of William A. Melody (Abst. 4). On the same date, the court ordered one Sam F. Fink to act as such *Amicus Curiae* with authority to investigate the circumstances of the preparation, execution, filing and presentation of the purported last Will of William A. Melody, dated June 21, 1964 (Abst. 17).

On September 10, 1964, a petition for a rule to show cause why Pauline Owens, Alma Allen, S. Edward Bloom, Velma Hoyle and Betty Jean Tewell should not be held in contempt of court was filed by the heirs of William A. Melody, together with the State's Attorney of Cook County

(Abst. 19). Such petition was filed with leave of court, the court further ordered the files impounded and issued body attachments for each of the individuals named in the petition (Abst. 39-40).

On September 11, 1964, an order was entered requiring service of the rule on the above named individuals and resetting the date of the hearing on the admission to probate of the Will filed by defendant from September 23, 1964 to September 17, 1964 (Abst. 41).

On September 17, 1964, after hearing testimony to the effect that the witnesses to the Will of June 21, 1964, affixed their signatures to the document after July 6, 1964, and that the date shown on the Will was inserted by a witness, Velma Hoyle, at the request of Alma Allen and Pauline Owens, the court declared such Will of June 21, 1964, to be a spurious document and denied its admission to probate (Abst. 42-43).

On September 21, 1964, with all parties present before the court on the return of the Writs of Attachment previously issued and all parties released on bond, an order was entered continuing the cause to October 27, 1964, requiring at that time, all respondents to answer the charge of contempt pending before the court (Abst. 43-44).

On October 21, 1964, the State's Attorney of Cook County filed a separate petition for a rule to show cause against petitioner, S. Edward Bloom, which petition was amended on November 18, 1964, alleging the circumstances hereinbefore described, with supporting affidavits (Abst. 45, 46, 47, 50, 51, 52, 53, 54, 56-63). On January 20, 1965, the motion of S. Edward Bloom to dismiss the amended petition of the State's Attorney of Cook County was denied, and a rule to show cause entered and returnable on February 1, 1965 (Abst. 70-71). Petitioner failed to answer the rule. A hearing commenced on February 2, 1965, and

culminated on February 24, 1965, with the entry of an order adjudging the petitioner in contempt of court and sentencing him to the County Jail for a period of twenty-four months (Abst. 76, 77, 78). The Supreme Court of Illinois affirmed, 35 Ill. 2d 255, 220 N. E. 2d 475.

ARGUMENT.

An examination of the petition filed in this cause in relation to the considerations governing review on *certiorari* (Rule 19, Rules of the Supreme Court of the United States) manifests no justiciable issues warranting review by this Court on *certiorari*. The right to trial by jury in a state criminal contempt case is neither a federal question of substance not heretofore determined by this court, nor a decision which fails to stand in accordance with applicable decisions of this court (*United States* v. *Barnett*, 376 U. S. 681 [1963]; also cases cited in footnote 12, pp. 694-695). Such question presented by petitioner raises no conflict between the decision of the Supreme Court of Illinois, this Court, or any other federal court (*Green* v. *United States*, 356 U. S. 165 [1958]). Since the issue presented is one that has been both previously and recently settled, and does not involve a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, the need for review of the decision of the highest State court of Illinois is found lacking (Cf. *United States* v. *Barnett*, 376 U. S. 681 [1963] footnote 12, p. 695, with *Cheff* v. *Schnackenberg*, 384 U. S. 373 [1966]).

The right *per se* to a jury trial in a criminal contempt case has been denied in *Barnett*, where the court stated:

> "Finally, it is urged that those charged with criminal contempt have a constitutional right to a jury trial. The claim has been made and rejected here again and again. Only six years ago we held a full review of the issue in *Green* v. *United States*, 356 U. S. 165 (1958). We held there that '[t]he statements of this court in a long and unbroken line of decisions involving con-

tempts ranging from misbehavior in court to disobedience of court orders established beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right.' At 183. Nor can it be said with accuracy that these cases were based upon historical error. It has always been the law of the land, both state and federal, that the courts—except where specifically precluded by statute—have the power to proceed summarily in contempt matters."

". . . we have at least 50 cases of this court that support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense. We list these in the margin.[12] It does appear true that since 1957 the penalties imposed in cases reaching this court have increased appreciably. But those cases did not settle any questions as to the punishment imposed."

Petitioner contends, however, that important modifications in the area of trials of criminal contempts were set forth by this Court in *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), and appear to conflict with *Barnett* (Petition, p. 8). Respondent does not agree. In *Cheff*, this court specifically held that a sentence of six months for criminal contempt imposed by a lower federal court without a jury was not subject to constitutional attack, and further stated that trial by jury was required unless waived for sentences of a greater duration. However, the latter directive was bottomed, not upon a constitutional right but, upon the regulatory power of this court over lower federal courts:

". . . we recognize that by limiting our opinion to those cases where a sentence not exceeding six months is imposed, we leave the federal courts at sea in instances involving greater sentences. Effective administration compels us to express a view on that point. Therefore, *in the exercise of the court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases*, we further rule that sentences exceeding six months for criminal contempt

> may not be imposed by federal courts unless a jury trial has been received and waived." (86 Sup. Ct. 1523, at 1526).

The power of a state court to punish for criminal contempt without a trial by jury is governed by the principles set down in *United States* v. *Barnett,* 376 U. S. 618 (1963). Nothing in the opinion of *Cheff* v. *Schnackenberg,* 384 U. S. 373 (1966) can be viewed either as a modification of *Barnett,* or as a constitutional limitation upon the powers of state courts in this area.

The remaining issues raised by petitioner fail to satisfy the prerequisite of substantial constitutional matter. First, the appointment of an *Amicus Curiae* by the state trial judge, prior to the formal institution of contempt proceedings, to investigate and report facts surrounding the petitioner's conduct has been recognized as proper (*People* v. *Goss,* 10 Ill. 2d (1957)). Such appointment was made only after a petition was filed in the Probate Division of the Circuit Court of Cook County by heirs of the decedent demanding that an investigation be made and alleging that fraud may have been committed with respect to the estate (Abst. 4). Since the investigation and report by the *Amicus Curiae* was accomplished prior to the institution of a rule to show cause against petitioner, there was no obligation to include it as part of the trial record, save to allow petitioner's counsel access to it during cross-examination of witnesses who both testified at the trial and made statements to the investigator. This, the trial judge allowed so that petitioner would be able to bring forth any prior inconsistent statements of witnesses who testified at the trial (Petition, p. 7, Abst. 89, 90). Further, petitioner sets forth no criteria indicative of prejudice to him by the exclusion of the pre-trial report from the record. Respondent, therefore, contends that no real constitutional question regarding this issue has been or can be presented from the record in this cause.

Secondly, the comment of the prosecutor as to petitioner's failure to testify is not, here, raised to the dignity of a constitutional question. Initially, petitioner failed to question the sufficiency of the evidence in his appeal to the Supreme Court of Illinois. Any error caused by such statement would be prejudicial only in the context of its assessment by the trier of fact to either buttress the evidence introduced by the state, or to destroy the effectiveness of any defense promulgated by the petitioner. Since the *quantum* of evidence supporting the verdict was not challenged in the state court, the error committed is harmless and non-prejudicial in the constitutional sense. Moreover, since the court was the trier of fact, since he was apprised of the fact that the petitioner did not testify, and since the contempt proceeding is not a criminal offense, but an action *sui generis,* the statement does not result in reversible error so long as the entire record substantiates the verdict. That it does so is evidenced by petitioner's constant failure to question the sufficiency of the evidence adduced at his trial.

CONCLUSION.

For the foregoing reasons, respondent respectfully prays that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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